IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL SIMON	:	CIVIL ACTION
	:	
v.	:	
	:	
UNUMPROVIDENT CORPORATION, et al.	:	NO. 99-6638

MEMORANDUM AND ORDER

HUTTON, J. May 23, 2002

Currently, before the Court are Defendants UnumProvident Corporation, Provident Companies, Inc., Provident Life and Accident Insurance Company and the Paul Revere Life Insurance Company's Motion for Partial Summary Judgment (Docket No. 69), Plaintiff's Response to Defendants' Motion for Partial Summary Judgment and Cross-Motion for Summary Judgment (Docket No. 77), Defendants' Reply to Plaintiff's Response to Defendants' Motion for Partial Summary Judgment and Defendants' Reply to Plaintiff's Motion for Summary Judgment (Docket No. 89), Plaintiff's Addendum and Supplemental Memorandum of Law in Support of Plaintiff's Response to Defendants' Motion for Partial Summary Judgment (Docket Nos. 99, 100), Defendants' Response to Plaintiff's Addendum (Docket No. 108), Defendants' Response to Plaintiff's Supplemental Memorandum of Law (Docket No. 110); Plaintiff's Addendum to Plaintiff's Memorandum of Law (Docket No. 140) and Defendants' Response to Plaintiff's Addendum (Docket No. 141). For the reasons discussed below, Defendants' Motion for Partial Summary Judgment is **GRANTED**

IN PART, DENIED IN PART and Plaintiff's Motion for Summary Judgment is **DENIED**.

I. BACKGROUND

The instant action arises out of the termination of benefit payments and denial of a claim of disability. On January 8, 1991, Plaintiff Michael Simon ("Plaintiff") purchased an occupation specific Lifetime Disability Income Policy from Defendant Paul Revere Insurance Company ("Paul Revere"). At the time Plaintiff purchased the policy, he was employed as an Options Floor Trader at the Philadelphia Stock Exchange in Philadelphia, Pennsylvania, a position he held since 1984. Under the terms of the policy, Plaintiff was to pay an annual premium of $1,984.63 for coverage in the amount of $5,000 of benefits per month. The policy also included an option to increase Plaintiff's monthly total disability benefits, which Plaintiff purchased, thus entitling him to a monthly benefit of $6,720.

In January of 1994, Plaintiff began treatment with psychiatrist John Harding, M.D. for severe anxiety and depression. Plaintiff initially remained at work as an Options Floor Trader at the Philadelphia Stock Exchange despite undergoing treatment, including medication and psychotherapy, with Dr. Harding. After being admitted on an emergency basis to Charter Fairmount Institute, however, Plaintiff filed a claim for total disability benefits pursuant to the disability policy on September 18, 1995. Paul Revere paid the benefits to Plaintiff on a monthly basis until

May 17, 1999 when Plaintiff's benefits were terminated. Prior to the termination of Plaintiff's disability payments, Paul Revere became a wholly-owned subsidiary of Provident Companies, Inc. ("Provident") on March 27, 1997. Provident, in turn, merged with Unum Corporation on June 30, 1999 forming an entity known as UnumProvident Corporation ("UnumProvident").

In November of 1999, Plaintiff instituted the instant lawsuit in the Court of Common Pleas of Philadelphia County alleging that he was wrongfully denied benefits under the disability insurance policy. Plaintiff named UnumProvident, Provident, Provident Life and Accident Insurance Company ("Provident Life") and Paul Revere as defendants to the instant action. Defendants then removed the case to this Court on December 30, 1999 based on diversity jurisdiction under 28 U.S.C. § 1332. Following the case's removal, Plaintiff filed a four-count Amended Complaint on January 18, 2000 alleging causes of action for breach of contract, bad faith, unfair trade practices and consumer protection law violations and civil conspiracy. Defendants UnumProvident, Provident, Provident Life and Paul Revere now move for partial summary judgment on all counts. Plaintiff opposes Defendants' motion and also cross-motions for summary judgment as to Plaintiff's bad faith claim.

II. LEGAL STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file,

together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment has the initial burden of showing the basis for its motion. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Once the movant adequately supports its motion pursuant to Rule 56(c), the burden shifts to the nonmoving party to go beyond the mere pleadings and present evidence through affidavits, depositions, or admissions on file to show that there is a genuine issue for trial. See id. at 324. A genuine issue is one in which the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

When deciding a motion for summary judgment, a court must draw all reasonable inferences in the light most favorable to the nonmovant. Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992), cert. denied, 507 U.S. 912, 113 S.Ct. 1262, 122 L.Ed.2d 659 (1993). Moreover, a court may not consider the credibility or weight of the evidence in deciding a motion for summary judgment, even if the quantity of the moving party's evidence far outweighs that of its opponent. Id. Nonetheless, a party opposing summary judgment must do more than just rest upon mere allegations, general denials or vague statements. Saldana v.

Kmart Corp., 260 F.3d 228, 232 (3d Cir. 2001).

III. DISCUSSION

A. Breach of Contract

First, Defendants UnumProvident, Provident and Provident Life seek summary judgment on Count I of Plaintiff's Amended Complaint for breach of contract. To establish a cause of action for breach of contract under Pennsylvania law,[1] Plaintiff must allege (1) the existence of a contract between the parties, (2) a breach of a duty imposed by the contract and (3) resultant damages. See CoreStates Bank, N.A. v. Cutillo, 723 A.2d 1053, 1058 (Pa. Super. Ct. 1999). According to Defendants, Plaintiff is unable to maintain a cause of action for breach of contract as a matter of law against UnumProvident, Provident and Provident Life because these Defendants were not parties to the original insurance contract. See Defs.' Mot. Summ. J. at ¶ 15. "It is fundamental contract law that one cannot be liable for a breach of contract unless one is a party to that contract." Electron Energy Corp. v. Short, 597 A.2d 175, 177 (Pa. Super. Ct. 1991), aff'd, 618 A.2d 395 (Pa. 1993) (citations omitted). Plaintiff does not dispute that UnumProvident, Provident and Provident Life are non signatories to the insurance contract which is the fulcrum of this dispute, nor

[1] Neither party disputes the applicability of Pennsylvania law to the policy at issue. See Centennial Ins. Co. v. Meritor Sav. Bank, Inc., 1992 WL 164906, at *2 (E.D. Pa. July 6, 1992) (holding that "an insurance contract is governed by the law of the state in which the contract was made"), aff'd, 993 F.2d 876 (3d Cir. 1993).

does Plaintiff allege that he had a separate contract with these Defendants. Rather Plaintiff, advancing theories of joint venture, joint enterprise and alter ego, asserts that UnumProvident, Provident and Provident Life acted "jointly in furtherance of a common plan or scheme to deny Plaintiff his rights under his disability insurance contract." Pl.'s Resp. to Defs.' Mot. Summ. J. at 6.

Under Pennsylvania law, a corporation is generally regarded as a "separate and independent entity." Commonwealth v. Vienna Health Prods., Inc., 726 A.2d 432, 434 (Pa. Commw. Ct. 1999). Accordingly, a parent corporation is not generally liable for the contractual obligations of a subsidiary, even if the parent wholly owns the subsidiary. See Quandel Group v. Chamberlin Co., Inc., Civ. A. No. 98-5762, 1999 WL 386602, at *2 n.1 (E.D. Pa. June 14, 1999) (citing Botwinick v. Credit Exch., Inc., 213 A.2d 349, 353-54 (Pa. 1965)); Jean Anderson Hierarchy of Agents v. Allstate Life Ins. Co., 2 F.Supp.2d 688, 691 (E.D. Pa. 1998); Nobers v. Crucible, Inc., 602 F.Supp. 703, 706 (W.D. Pa. 1985). Nevertheless, liability may be imposed where a parent corporation so dominates the activities of a subsidiary that it is necessary to treat the dominated corporation as an "alter ego" of the principal. See Botwinick, 213 A.2d at 354 (recognizing that "alter ego" theory under Pennsylvania law requires "domination and control by the parent corporation [that] renders the subsidiary a mere

instrumentality of the parent"); see also Garden State Tanning, Inc. v. Mitchell Mfg. Group, Inc., 55 F.Supp.2d 337, 344 (E.D. Pa. 1999) ("Pennsylvania requires a very high showing of domination and control in order to establish 'alter-ego liability.'") (quoting Jiffy Lube Int'l v. Jiffy Lube, 848 F.Supp. 569, 580 (E.D. Pa. 1994)).

To warrant piercing the veil on an alter-ego theory, a plaintiff must demonstrate that the parent company exercised "complete domination, not only of finances but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own." Craig v. Lake Asbestos of Quebec, Ltd., 843 F.2d 145, 150 (3d Cir. 1988); see also Culbreth v. Amosa Ltd., 898 F.2d 12, 14 (3d Cir. 1990) (holing that a plaintiff seeking to pierce the corporate veil on an alter-ego theory must establish that "the controlling corporation wholly ignored the separate status of the controlled corporation and so dominated and controlled its affairs that its separate existence is a mere sham"). Relevant factors include "the failure to observe corporate formalities; non-payment of dividends; insolvency of debtor corporation; siphoning the funds from corporation by dominant shareholders; non-functioning of other officers and directors; absence of corporate records; whether the corporation is a mere facade for the operations of a common shareholder or

shareholders; and gross undercapitalization." Eastern Minerals & Chemicals Co. v. Mahan, 225 F.3d 330, 333 n.7 (3d Cir. 2000) (citation omitted).

Defendants contend that Plaintiff cannot prevail on an alter ego theory because each Defendant is a single corporate entity that is not responsible for the acts of the other.[2] See Defs.' Reply to Pl.'s Resp. to Defs.' Mot. Summ. J. at 4. Therefore, Defendants reason that UnumProvident, Provident and Provident Life are entitled to summary judgment on Plaintiff's breach of contract claim since only Paul Revere entered into the contract with Plaintiff. See id. at 2. Interestingly, these Defendants have advanced the same argument in other jurisdictions, but have met with little success. See Brennan v. Paul Revere Life Ins. Co., Civ. A. No. 00-0752, 2002 WL 54558 (N.D. Ill. Jan. 15, 2002); Eldridge v. Provident Companies, Inc., Civ. A. No. 97-1294, 2001 WL

[2] In support of their contention, Defendants rely heavily on the case of Hudock v. Donegal Mut. Ins. Co., 264 A.2d 668 (Pa. 1970). In Hudock, plaintiffs/insureds brought an action for breach of contract against two independent adjustment companies who were hired by the insurer to adjust plaintiffs' fire loss claim. See id. at 276. The Pennsylvania Supreme Court found that plaintiffs could not maintain a breach of contract action against the independent adjustment companies because they failed to show that a contractual relationship existed between themselves and the adjustment companies. See id. at 279. The court found that while the independent adjustment companies had a duty to the insurance company, this duty did not extend to create a contractual obligation between the adjusters and the insureds. See id. Hudock, however, is distinguishable from the case at bar. Here, the Court is not presented with the case where a plaintiff is attempting to sue an independent adjustment company. Rather, Plaintiff has brought a cause of action against principal corporations and their wholly-owned subsidiaries who maintain a single unified claims department. Moreover, Plaintiff here has raised the question as to whether the parent companies so dominated Paul Revere that Paul Revere acted as their alter-ego during the termination of Plaintiff's benefits in May of 1999.

13344 (Mass. Super. Ct. Jan. 4, 2001).

In Brennan v. Paul Revere Life Ins. Co., Civ. A. No. 00-0752, 2002 WL 54558 (N.D. Ill. Jan. 15, 2002), a case factually similar to the case at bar, a trader on the floor of the Chicago Stock Exchange purchased disability insurance from Paul Revere in 1989. See id. at *1. Brennan subsequently became disabled in 1997 and began to collect under the terms of the policy in September of that year. Id. After his benefits were terminated in 1999, Brennan brought suit against Paul Revere, Provident and Provident Life.[3] See id. As in the instant case, Provident moved for summary judgment on the grounds that "it did not issue the policy to Brennan and had no contractual relationship with him . . ." Id. at *3. The court, however, rejected Provident's argument, finding that questions of fact remained as to "which defendant was responsible for handling – and rejecting – Brennan's claim"

[3] The plaintiff in Brennan, however, did not advance a breach of contract theory against defendants. Rather, plaintiff alleged that defendants "acted vexatiously and unreasonably in investigating and terminating his claim" in violation of section 155 of the Illinois Insurance Code. See Brennan, 2002 WL 54558, at *2. Nevertheless, the Court finds the reasoning in Brennan relevant to the question now before the Court. Section 155 of the Illinois Insurance Code provides that:

> a court may award attorney fees and specified penalties in an action against an insurer when the court determines, in its discretion, that the insurer's delay in settling a claim was unreasonable and vexatious considering the totality of the circumstances. The remedy is available to an insured who encounters unnecessary difficulties when an insurer withholds policy benefits. It is designed to protect insured parties who are forced to expend attorneys' fees where the insurer refuses to pay under the terms of the policy.

Garcia v. Lovellette, 639 N.E.2d 935, 937 (Ill. App. 2 Dist. 1994) (internal citations omitted). Therefore, since liability under section 115 may be imposed only on an insurer, Provident, like it has done in the instant case, contended it could not be held liable because it was not an insurer and had not entered into the insurance contract. See Brennan, 2002 WL 54558, at *2.

following Provident's merger with Paul Revere. Id.

In Eldridge v. Provident Companies, Inc., Civ. A. No. 97-1294, 2001 WL 13344 (Mass. Super. Ct. Jan. 4, 2001), plaintiffs brought a broker class action lawsuit against Provident, Provident Life, Paul Revere and UnumProvident. See id. at *1. Unlike Brennan where the plaintiff was an insured, the plaintiffs in Eldridge were employed by Paul Revere as full time insurance agents prior to the merger with Provident. See Hughes v. Provident Companies, Inc., Civ. A. No. 97-1099, 2000 WL 331977, at *1 (Mass. Super. Ct. March 6, 2000). After Provident acquired Paul Revere, however, "Paul Revere and Provident notified all agents that their employment as agents was being terminated as of June 30, 1997 and that they would thereafter be re-employed by Provident as independent contractors. As a result of that change in their employment status, agents no longer received employee benefits or office and other expense support . . . Plaintiffs argue[d] that their termination constituted an additional violation of their Agent Agreements." Id. Defendants sought summary judgment on behalf of Paul Revere and UnumProvident, arguing that "the defendant operating companies are independent, solvent companies . . .." Eldridge, 2001 WL 13344, at *4. Again, the court declined to grant summary judgment in favor of Defendants on this ground because evidence of record, including "intermingling of corporate activity" and "active manipulation of related business entities by the same controlling

persons," was sufficient to demonstrate a material issue of fact as to whether the corporate veil should be pierced and the holding companies held liable. Id. at *5-6.

With regards to Defendants Provident and UnumProvident, the Court finds that a material issue of fact exists as to whether Paul Revere functioned as the alter ego of Provident/UnumProvident at the time Plaintiff's disability benefits were terminated. Plaintiff has presented evidence that, after the merger with Paul Revere, Provident considered Paul Revere's income its own (see Pl.'s Resp. to Defs.' Mot. Summ. J., Ex. 4), Provident issued checks to insureds on behalf of Paul Revere (see id. at Ex. 11), and Provident treated Paul Revere's personnel as its own. See id. at Ex. 15, Ex. 16; see also Hangarter v. Paul Revere Life Ins. Co., 2001 WL 1246623, at *3 (N.D. Cal. Sept. 21, 2001) (finding that evidence in lawsuit tended to show "that when Provident acquired Paul Revere, as part of the transition, Paul Revere employees became Provident employees and implemented Provident's policies for handling claims, . . . targeting certain types of claims for termination."). Heidi Scuderi, the claims representative assigned to Plaintiff's case, was an employee of Provident/UnumProvident at the time Plaintiff's benefits were terminated. See Dep. of H. Scuderi, Dec. 13, 2000, at 13. Moreover, the Worcester claims office, which handled Plaintiff's claim, did not distinguish in its monthly reporting between Provident claims and Paul Revere claims. See Pl.'s Resp. to Defs.' Mot. Summ. J. at 18; Ex. 34. This evidence, and the reasonable inferences that may be drawn therefrom, is sufficient to create a genuine issue of material fact

as to whether Provident, now UnumProvident, so dominated the finances, policies and business practices of Paul Revere as to render Paul Revere without a "'mind, will or existence of its own.'" Stevens, 2000 WL 1848593, at *3. Therefore, the Court denies Defendants' motion for partial summary judgment as it pertains to Provident and UnumProvident.

The same cannot be said about Defendant Provident Life. Plaintiff fails to produce evidence of any kind that affiliates Provident Life with this case other than it being a subsidiary of UnumProvident. As previously mentioned, Provident Life is a subsidiary of UnumProvident that is authorized and licensed to conduct business as an insurance company. The record at bar, however, is devoid of any evidence linking Provident Life to Plaintiff's claim or the facts of this case. The only connection Provident Life has with the other Defendants is that it, like Paul Revere, is a subsidiary of Provident, and thus became a subsidiary of UnumProvident. Plaintiff does not allege that Provident Life exercised any dominion and control over Paul Revere's claims, finances or policies, or that Provident Life issued, investigated or terminated Plaintiff's disability benefits. In fact, Plaintiff makes only vague and conclusory statements regarding Provident Life's involvement that are unsupported by any evidence. In order to defeat a motion for summary judgment, Plaintiff must move beyond such illusory allegations in favor of competent evidence. Saldana

v. Kmart Corp., 260 F.3d 228, 232 (3d Cir. 2001). With regards to Defendant Provident Life, Plaintiff has failed to do so. Accordingly, Defendants' motion for partial summary judgment is granted as to Provident Life and Plaintiff's claims against Provident Life are hereby dismissed with prejudice.

B. Bad Faith

Next, Defendants seek the entry of summary judgment on Count II of Plaintiff's Amended Complaint for bad faith. See Defs.' Mot. Summ. J. at ¶ 25-33. Plaintiff, in turn, cross-claims for summary judgment in his favor on the same count. See Pl.'s Resp. to Defs.' Mot. Summ. J. at 33. Pennsylvania has established a statutory remedy for bad faith on the part of insurance companies. See 42 Pa.C.S.A. § 8371. Section 8371 provides:

> In an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, the court may take all of the following actions:
> (1) Award interest on the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate of interest plus 3%.
> (2) Award punitive damages against the insurer.
> (3) Assess court costs and attorneys fees against the insurer.

42 Pa.C.S.A. § 8371. While the statute itself does not define bad faith, several courts have enunciated the standard for assessing insurer bad faith under section 8371. "[T]he term bad faith includes any frivolous or unfounded refusal to pay proceeds of a policy. For purposes of an action against an insurer for failure to pay a claim, such conduct imparts a dishonest purpose and means

a breach of a known duty (i.e., good faith and fair dealing), through some motive of self interest or ill will; mere negligence or bad judgment is not bad faith." Keefe v. Prudential Prop. & Cas. Ins. Co., 203 F.3d 218, 225 (3d Cir. 2000) (internal citations omitted).

In order to recover under a bad faith claim, a plaintiff must show (1) that the defendant did not have a reasonable basis for denying benefits under the policy; and (2) that the defendant knew or recklessly disregarded its lack of reasonable basis in denying the claim. Id. The plaintiff has the burden of proving both of these elements by clear and convincing evidence. Klinger v. State Farm Mut. Auto. Ins. Co., 115 F.3d 230, 233 (3d Cir. 1997); see also Greco v. Paul Revere Life Ins. Co., Civ. A. No. 97-6317, 1999 WL 95717, at *3 (E.D. Pa. Feb. 12, 1999). Accordingly, Plaintiff faces the same stringent "clear and convincing evidence" standard in opposing a motion for summary judgment. See Greco, 1999 WL 95717, at *3. "Thus, to defeat a motion for summary judgment, plaintiff must present sufficient evidence such that, if believed, a jury could find bad faith under the clear and convincing evidence standard." Id.

Defendants allege that Plaintiff cannot maintain a cause of action for bad faith under Pennsylvania law because Defendants reasonably relied on the reports of independent medical experts in terminating Plaintiff's disability claim. See Defs.' Mot. Summ. J.

at ¶ 30-33. Specifically, Defendants contend that they relied on the report of Dr. Timothy J. Michals, a psychiatrist, that concluded Plaintiff was able to return to his profession as an options trader. See Defs.' Reply to Pl.'s Resp. to Defs.' Mot. Summ. J. at 11-15. In forming their decision to terminate Plaintiff's benefits, Defendants also claim that they reasonably relied on the report of Dr. Steven Samuel, a psychologist. See Defs.' Mem. in Supp. of Mot. Summ. J. at 15. Plaintiff counters that Defendants recklessly disregarded the initial report of Dr. Samuel which concluded that Plaintiff was totally disabled and unable to return to his former profession as an options trader on the Stock Exchange floor. See Pl.'s Resp. to Defs.' Mot. Summ. J. at 25.

The evidence of record reveals that Dr. Stephen Samuel evaluated Plaintiff in April and May of 1999 and submitted a report in which he concluded that Plaintiff was "totally and permanently impaired from functioning as a trader on the options floor" and that "[r]eturning to that environment . . . would result in a decisive psychological regression and is, therefore, from a clinical standpoint contraindicated." See Pl.'s Resp. to Defs.' Mot. Summ. J., Ex. 26., at 4-5. Dr. Samuel faxed the report to Genex Services, a contractor of Provident, who in turn faxed it to Andrew Carlson, a non-medical psychiatric consultant employed by Provident/UnumProvident. See id., Ex. 27. Carlson then phoned Dr.

Samuel regarding the report and explained to Dr. Samuel that he found the above-quoted paragraph "confusing." See Dep. of Steven Samuel, Ph.D., Jan. 31, 2002, at 76; see also id. at 90 ("Mr. Carlson called me and alerted me that there was a problem in his mind with the language of the report . . .."). Following the phone conversation, Dr. Samuel issued a second report. See Pl.'s Resp. to Defs.' Mot. Summ. J., Ex. 30. While the first four pages of the second report are identical to the first, Dr. Samuel's opinion that Plaintiff was "totally and permanently impaired from functioning as a trader on the options floor" and that "[r]eturning to that environment . . . would result in a decisive psychological regression" was eradicated completely from the second report. Compare Pl.'s Resp. to Defs.' Mot. Summ. J., Ex. 26 ("First Report"), at 4-5 with Ex. 30 ("Second Report"), at 4-5.

In this case, it is undisputed that the disability insurance policy issued to Plaintiff was an occupation specific policy which defined Plaintiff's occupation as an "options floor trader." Heidi Scuderi, the Provident/UnumProvident claims adjuster assigned to Plaintiff's claim, testified that the Defendants' claims department developed a policy that "options traders' duties are not specific to the floor" and that "they can trade in other areas such as computerized trading." Dep. of Heidi Scuderi, Dec. 13, 2001, at 120-21. Plaintiff has presented evidence which, if credited by a jury, would show Dr. Samuel's disability opinion that Plaintiff was

totally and permanently disabled from returning to the floor of the Philadelphia Stock Exchange was redacted shortly after Andrew Carlson spoke with Dr. Samuel about the language of the report. See Pl.'s Resp. to Defs.' Mot. Summ. J., Ex. 26. ("First Report"), at 4-5. Furthermore, Plaintiff has presented evidence from which a reasonable jury could conclude that Dr. Michals was made aware of Defendants' policy regarding options traders' ability to work off the floor before Dr. Michals issued his opinion that Plaintiff can return to his "previous employment as a trader," not as a floor trader. See Pl.'s Resp. to Defs.' Mot. Summ. J., Ex. 38 ("Report of J. Pickering," Nov. 2, 1995); see also Defs.' Reply to Pl.'s Resp. to Defs.' Mot. Summ. J. Ex. G ("Report of Timothy J. Michals, M.D.," June 14, 1999, at 7) (emphasis added). Plaintiff has therefore adduced sufficient evidence from which a jury could find under the clear and convincing standard that Defendants acted in bad faith in its investigation of Plaintiff's claim and in its dealings with independent medical experts upon whose reports they allegedly based their decision to terminate Plaintiff's benefits. Accordingly, Defendants are not entitled to summary judgment on Plaintiff's contention that the denial of his disability claim violated the Pennsylvania Bad Faith Statute.

The Court, however, agrees with Defendants that Plaintiff's cross-motion for summary judgment as to the bad faith count must also be denied. See Defs.' Reply to Pl.'s Resp. to Defs.' Mot.

Summ. J. at 15. As Defendants point out, a material issue of fact exists as to whether or not Plaintiff is "psychiatrically totally disabled" and, therefore, whether Plaintiff is fit to return to work as an options floor trader. See id. Plaintiff, therefore, is not entitled to judgment as a matter of law on his claim that Defendants terminated his benefits in bad faith when a question of fact exists as to whether Plaintiff was entitled to benefits under the policy in May of 1999. Accordingly, Plaintiff's cross-motion for summary judgment is denied.

C. Unfair Trade Practices and Consumer Protection Law Violations

Next, Defendants move for summary judgment with regards to Count III of Plaintiff's Amended Complaint for a violation of Pennsylvania's Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), 73 P.S. § 201-1 et seq. According to Defendants, Plaintiff is unable to produce any evidence to support a finding of malfeasance on the part of Defendants, as is required under the UTPCPL. See Defs.' Mot. Summ. J. at ¶ 39. The UTPCPL provides a private cause of action for:

> any person who purchases or leases goods or services primarily for personal, family, or household purposes and thereby suffers any ascertainable loss of money or property, as a result of the use or employment by any person of a method, act or practice declared unlawful by Section 3 of this Act . . .

73 P.S. § 201-9.2. "In Pennsylvania, only malfeasance, the improper performance of a contractual obligation, raises a cause of action under the Unfair Trade Practices and Consumer Protection

Law, . . . and an insurer's mere refusal to pay a claim which constitutes nonfeasance, the failure to perform a contractual duty, is not actionable." Horowitz v. Fed. Kemper Life Assur. Co., 57 F.3d 300, 307 (3d Cir. 1995) (citing Gordon v. Pennsylvania Blue Shield, 548 A.2d 600, 604 (Pa. 1988)). Allegations of misrepresentations and affirmative course of fraudulent conduct constitute malfeasance. Henry v. State Farm Ins. Co., 788 F.Supp. 241, 245-46 (E.D. Pa. 1992).

The Court agrees that the bulk of Count III of Plaintiff's Amended Complaint is filled with boiler plate language of "unfair methods of competition" and "unfair or deceptive trade practices" in an attempt to set forth a claim under the UTPCPL. For instance, Plaintiff claims that Defendants engaged in deceptive practices actionable under the UTPCPL by "[p]urporting to offer total disability insurance with a lifetime monthly benefit in the amount of $6,720.00 . . . when Defendants had no intention of providing such coverage" and by "[a]dvertising goods or services with intent not to sell them as advertised." See Pl.'s Am. Compl. at ¶ 30. It is unclear how Plaintiff can purport that Defendants had "no intention" of providing coverage under the policy when Plaintiff received disability benefits under the terms of the policy for almost four years, from September 18, 1995 to May 17, 1999. There is no evidence of record to support the bulk of Plaintiff's claims under the UTPCPL.

However, while the Court agrees with Defendants that Plaintiff's allegation that Defendants failed to pay on Plaintiff's claim without reasonable foundation is nonfeasance and therefore is not actionable under the UTPCPL as a matter of law, Plaintiff may proceed on his claim under the UTPCPL because a material issue of fact exists as to whether Defendants acted with malfeasance in investigating Plaintiff's claim. See Cake v. Provident Life & Accident Ins. Co., Civ. A. No., 98-4945 1999 WL 48778, at *2 (E.D. Pa. Jan. 15, 1999). Courts in this District have found that "[i]n the course of denying a claim for coverage . . . an insurer may engage in conduct that constitutes malfeasance or misfeasance and which thus could be actionable under the Consumer Protection Law." Id. at *2 (citing Smith v. Nationwide Mut. Fire Ins. Co., 935 F.Supp. 616, 620-21 (W.D. Pa. 1996) (allegation that post-loss investigation was performed improperly states claim); Parasco v. Pacific Indem. Co., 870 F.Supp. 644, 648 (E.D. Pa. 1994) (allegations that post-loss investigation was conducted in unfair manner and that insurer made misrepresentations regarding nature of its contractual obligations stated claim)). For instance, in Cake v. Provident Life & Accident Ins. Co., the court found that the plaintiff's allegation that the insurer "'conducted an unreasonable investigation of plaintiff's claim' suggests more than a failure to investigate. Rather, it suggests that defendant undertook an investigation and performed it improperly." See Cake, 1999 WL

48778, at *2.

Here, Plaintiff has provided evidence from which a reasonable jury could conclude that Defendants improperly performed an investigation as to whether Plaintiff was totally disabled and could not perform his occupation as an options floor trader. As noted above, Dr. Samuel redacted a statement from his report that Plaintiff was completely disabled from performing his occupation as an options trader on the floor after a phone conversation with Provident/UnumProvident employee Andrew Carlson. Based on this evidence and the reasonable inferences that may be drawn therefrom, a jury could conclude that Defendants acted with malfeasance when investigating Plaintiff's claim. Therefore, Plaintiff may proceed under the UTPCPL based on this ground.

D. Civil Conspiracy

Finally, Defendants seek the entry of summary judgment in their favor with regards to Count IV of Plaintiff's Amended Complaint for civil conspiracy. In Count IV, Plaintiff contends that Defendants conspired to unlawfully and wrongfully prevent Plaintiff from receiving his disability benefits under the policy. See Pl.'s Am. Compl. at ¶ 35. To prove a civil conspiracy under Pennsylvania law, a plaintiff must show the following elements: (1) a combination of two or more persons acting with a common purpose to do an unlawful act or to do a lawful act by unlawful means or for an unlawful purpose; (2) an overt act done in pursuance of the

common purpose; and (3) actual legal damage. See SNA, Inc. v. Array, 51 F.Supp.2d 554, 561 (E.D. Pa. 1999); see also Skipworth v. Lead Indus. Ass'n, Inc., 690 A.2d 169, 174 (Pa. 1997); Thompson Coal Co. v. Pike Coal Co., 412 A.2d 466, 472 (Pa. 1979). Proof of malice or an intent to injure is essential to the proof of a conspiracy. Strickland v. Univ. of Scranton, 700 A.2d 979, 987-88 (Pa. Super. Ct. 1997). "Merely describing something as malicious is not sufficient to give the proper inference of malice. . . . [m]alice requires an allegation that the sole purpose of the conspiracy was to injure the Plaintiff[]." Spitzer v. Abdelhak, Civ. A. No. 98-6475, 1999 WL 1204352, at *9 (E.D. Pa. Dec. 15, 1999)(citing Thompson Coal, 412 A.2d at 466).

Plaintiff proclaimed in his Amended Complaint that he intended to gain evidence to support his conspiracy theory through discovery. See Pl.'s Am. Compl. at ¶ 36. The discovery deadline in the instant case has long since past and yet Plaintiff is unable to produce even circumstantial evidence to support an inference of his conspiracy claim. An action for conspiracy will lie only where the sole purpose of the conspiracy is to cause harm to the party who claims to be injured. See Thompson Coal, 412 A.2d at 472. Thus, where the facts show that a person acted to advance his own business interests, those facts constitute justification and negate any alleged intent to injure. See id.; see also GMH Assoc., Inc. v. Prudential Realty Group, 752 A.2d 889, 905 (Pa. Super. Ct.

2000). While there is evidence to support an inference that Defendants terminated Plaintiff's disability benefits to support their business interest, there is no indication that they did so out of malice towards Plaintiff.

The Court also notes that, with regards to Plaintiff's civil conspiracy claim, Plaintiff's argument that Defendants functioned as a single entity is a double-edged sword. In order to proceed on a breach of contract theory against Provident and UnumProvident, Plaintiff had to demonstrate that a material issue of fact exists as to whether Provident, now UnumProvident, and Paul Revere functioned as a single entity. With regards to Plaintiff's civil conspiracy claim, however, this argument cuts the other way. "A single entity cannot conspire with itself and, similarly, agents of a single entity cannot conspire among themselves." Rutherfoord v. Presbyterian-Univ. Hosp., 612 A.2d 500, 508 (Pa. Super. Ct. 1992). All of the participants of Defendants' alleged conspiracy were employees or contractors of Provident/UnumProvident. Accordingly, Plaintiff's claim for civil conspiracy cannot withstand Defendants' motion for summary judgment.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL SIMON	:	CIVIL ACTION
	:	
v.	:	
	:	
UNUMPROVIDENT CORPORATION, et al.	:	NO. 99-6638

O R D E R

AND NOW, this 23rd day of May, 2002, upon consideration of Defendants UnumProvident, Provident Companies, Inc., Provident Life and Accident Insurance Company and the Paul Revere Life Insurance Company's Motion for Partial Summary Judgment (Docket No. 69), Plaintiff's Response to Defendants' Motion for Partial Summary Judgment and Cross-Motion for Summary Judgment (Docket No. 77), Defendants' Reply to Plaintiff's Response to Defendants' Motion for Partial Summary Judgment and Defendants' Reply to Plaintiff's Motion for Summary Judgment (Docket No. 89), Plaintiff's Addendum and Supplemental Memorandum of Law in Support of Plaintiff's Response to Defendants' Motion for Partial Summary Judgment (Docket Nos. 99, 100), Defendants' Response to Plaintiff's Addendum (Docket No. 108), Defendants' Response to Plaintiff's Supplemental Memorandum of Law (Docket No. 110); Plaintiff's Addendum to Plaintiff's Memorandum of Law (Docket No. 140) and Defendants' Response to Plaintiff's Addendum (Docket No. 141), IT IS HEREBY ORDERED that Defendants' Motion for Partial Summary Judgment is **GRANTED IN PART, DENIED IN PART** and Plaintiff's Motion for Summary Judgment on the bad faith count is **DENIED**.

(1) Defendants' Motion for Partial Summary Judgment is **GRANTED** as to Provident Life;

IT IS FURTHER ORDERED that Plaintiff's claims against Provident Life are hereby **DISMISSED WITH PREJUDICE**.

(2) Defendants' Motion for Partial Summary Judgment on Count I of Plaintiff's Amended Complaint for breach of contract is **DENIED** as to Provident Companies, Inc. and UnumProvident;

(3) Defendants' Motion for Partial Summary Judgment as to Count II of Plaintiff's Amended Complaint for bad faith is **DENIED;**

(4) Plaintiff's Cross-Motion for Summary Judgment on Count II of Plaintiff's Amended Complaint for Bad Faith is **DENIED**;

(5) Defendants' Motion for Partial Summary Judgment as to Count III of Plaintiff's Amended Complaint for a violation of Pennsylvania's Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-1 is **DENIED**;

(6) Defendants' Motion for Partial Summary Judgment as to Count IV of Plaintiff's Amended Complaint for Civil Conspiracy is **GRANTED**;

IT IS FURTHER ORDERED that Count IV of Plaintiff's Amended Complaint is hereby **DISMISSED WITH PREJUDICE**.

BY THE COURT:

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HERBERT J. HUTTON, J.